Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition of YouMail, Inc. for Expedited Declaratory Ruling that YouMail's Service Does Not Violate the TCPA	)	

REPLY COMMENTS OF GLIDE TALK, LTD.

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Glide Talk, Ltd. ("Glide Talk"), by its attorneys, hereby comments on the above-captioned Petition for Declaratory Ruling ("YouMail Petition" or "Petition").[1] As discussed herein, the Commission should grant the YouMail Petition and issue a declaratory ruling clarifying the scope of the Telephone Consumer Protection Act ("TCPA").[2] Without Commission action in favor of the petitions filed by YouMail and certain other petitioners,[3] lingering regulatory uncertainty will continue to give rise to costly class action lawsuits that

[1] YouMail, Inc. Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Apr. 19, 2013) ("YouMail Petition" or "Petition"); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from YouMail, Inc.*, Public Notice, DA 13-1433, CG Docket No. 02-278 (rel. June 25, 2013).
[2] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (current version at 47 U.S.C. § 227 (2010)); 47 C.F.R. § 1200.
[3] Communication Innovators Petition for Declaratory Ruling, CG Docket No. 02-278 (filed June 7, 2012) (requesting clarification that predictive dialers that are not used for telemarketing purposes and do not have the current ability to generate and dial random or sequential numbers are not automatic telephone dialing systems under the TCPA); GroupMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (requesting clarification regarding the scope of the term "capacity" and that third-party consent is sufficient for non-telemarketing, informational calls or text messages to wireless numbers under the TCPA).

undermine the important consumer-oriented goals of the TCPA and threaten to deprive the public of innovative new communications products and services.

I. INTRODUCTION AND BACKGROUND

Glide Talk was founded in 2012 by three entrepreneurs who live in Israel, thousands of miles from many of their American friends and family members. Frustrated by the difficulties of communicating across multiple time zones, they created an easier way to stay in touch using video chat and the transmission of recorded video messages. The Glide video messaging service ("Glide App"), which is available for Apple and Android devices,[4] has been called "the world's first video walkie talkie."[5] The Glide App is the first communications product to enable real-time communication through video messaging technology. It combines the intimacy of video chats with the convenience of texting by allowing users to send private video messages to friends with just a single tap on their mobile devices. If the recipient is available, he or she can see the message live as it is broadcast; if not, messages are stored in the cloud and can be watched (and responded to) later, like a text message. As a result, the Glide App overcomes many of the challenges of other live video chat models – the hassle of scheduling, poor picture quality, and calls freezing or dropping – by combining video chat with a messaging-type store and forward approach. The Glide App differs from other video messaging services due largely to the service's speed; Glide streams videos, 70 percent of which are watched before the message sender has even completed the message. Moreover, the Glide App's simple, one-touch user interface enables users to avoid the cumbersome process of attaching video files to texts.

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[4] The Android version of the Glide App is currently in beta.

[5] Confirming the transformative potential of the Glide App, Glide Talk recently was voted an Audience Choice winner at TechCrunch's Disrupt NY 2013 Startup Battlefield. *See* Chris Velazco, *Glide Rolls Out The Beta Version Of its Video Messaging Android App At Disrupt NY*, TechCrunch (Apr. 29, 2013), http://techcrunch.com/2013/04/29/glide-rolls-out-the-beta-version-of-its-video-messaging-android-app-at-disrupt-ny/.

Although the Glide App is not a conventional text messaging service and does not rely on Short Message Service ("SMS") or Multimedia Messaging Service technology for its primary functionality,[6] the service offers users the ability to invite friends to join using SMS text messages. Like any networked service, the Glide App's appeal and usability for any individual depends on whether that individual's friends and family members also are users of the Glide App. Thus, the Glide App enables users to select friends and family from their devices' contact lists and to invite those individuals to use the app themselves. The user controls these invitation messages by customizing the content of the messages and choosing the recipients. The Glide App merely provides a convenient mechanism through which a Glide App user may send a text message invitation, just as the user could do directly on the same device by using the device's text messaging interface outside of the Glide App.

The YouMail Petition represents an important opportunity for the FCC to clarify its interpretation of the TCPA in a manner that will eliminate the uncertainty that threatens the continued availability of popular services like the Glide App. The FCC should rebuff those who would interpret the TCPA so broadly as to harm consumers by depriving them of access to innovative new products and services and limiting their ability to choose to use text messaging in connection with such products and services. Specifically, the Commission should issue a declaratory ruling confirming that (a) the TCPA's automatic telephone dialing system ("ATDS") restriction[7] applies only to equipment that could, at the time of the call, be used to store or generate sequential or randomized telephone numbers, and (b) software and application

[6] The Glide App is a cloud-based, proprietary video messaging service that utilizes the Internet connectivity of users' devices to transmit video messages between users of the Glide App.
[7] 47 U.S.C. § 227(1) ("The term 'automatic telephone dialing system' means equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.").

providers that enable consumers to choose to send text messages do not "make" calls under the TCPA merely by facilitating the ability of their users to send the text messages. By doing so, the Commission can continue to aggressively protect consumers as Congress intended under the TCPA without punishing innovation or limiting consumers' access to desired new products and services.

II. THE COMMISSION SHOULD CLARIFY ITS INTERPRETATION OF THE TCPA

Glide Talk supports the goals of the TCPA, which Congress enacted in 1991 to address certain undesirable telemarketing practices that "could be an intrusive invasion of privacy and, in some instances, a risk to public safety."[8] Glide Talk believes, however, that the current uncertainty surrounding the correct interpretation of the TCPA must be addressed. As a general matter, the declaratory rulings requested by YouMail and other petitioners would provide clarity with respect to two Commission decisions over the past 10 years that were intended to address the behavior of telemarketers.[9] These decisions have been read more broadly – and inappropriately – by plaintiffs' lawyers who have filed hundreds of class action lawsuits nationwide. This proliferation of litigation threatens valuable services that the public desires and has no nexus to the unwanted telemarketing against which the law is designed to protect. Specifically, the Commission should issue a ruling that expressly states that the TCPA's prohibition on making calls to wireless phones using ATDSs does not apply to the peer-to-peer text messages sent using automated equipment—*i.e.,* equipment that does not require manual

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, *Report and Order*, 7 FCC Rcd 8752, 8753 ¶ 2 (1992) ("*1992 Order*"); *accord Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Report and Order*, 18 FCC Rcd 14014, 14018 ¶ 4 (2003) ("*2003 Order*"); TCPA, 105 Stat. 2394, 2395; Sen. Rep. No. 102-178 at 1 (1991); 137 Cong. Rec. 18123 (1991) (stating that the legislation was introduced to ban "computer voice" telemarketing calls).

[9] *See 2003 Order*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Declaratory Ruling*, 23 FCC Rcd 559 (2008) ("*2008 Order*").

dialing. Further, the Commission should make clear that when a user, rather than a provider, chooses the recipients and/or content of messages sent through such software or apps, the provider of the software or app does not "make" a call for purposes of the TCPA.

The history of the Commission's TCPA implementation demonstrates the evolution of the statute's interpretation towards a dangerous lack of clarity. Initially, the Commission adopted rules that appropriately effectuated the statute's provisions barring the transmission of calls using random or sequential number generators. The Commission specified, however, that this prohibition does *not* apply to services or functions where "the numbers called are not generated in a random or sequential fashion."[10] Thereafter, the Commission confirmed that the TCPA's ATDS prohibition does not apply to calls that "are not directed to randomly or sequentially generated telephone numbers. . . ."[11]

In 2003, however, the Commission reviewed its implementation of the TCPA, citing the fact that "the telemarketing industry has undergone significant changes in the technologies and methods used to contact consumers."[12] The Commission suggested in this and certain subsequent decisions that the TCPA prohibits the use of an autodialer to make "Telemarketing Calls to Wireless Numbers," including SMS calls.[13] Specifically, to clarify that telemarketers could not circumvent the TCPA's protections by using lists of numbers rather than randomly generated or sequentially generated numbers, the Commission suggested that the use of predictive dialers to call consumers without their consent is prohibited regardless of whether the

[10] *1992 Order*, 7 FCC Rcd at 8776 ¶ 47.
[11] *Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, *Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12398 ¶ 19 (1995) ("*1995 Order*").
[12] *2003 Order*, 18 FCC Rcd at 14017 ¶ 2.
[13] *Id.* at 14115 ¶ 165.

dialer randomly generates numbers or uses a list.[14] Some have interpreted these Commission decisions to mean that the critical question in determining whether a call is covered by the TCPA is whether the equipment used to make the call merely has "the capacity to dial numbers without human intervention."[15]

The unintended consequence of this more expansive construction of the TCPA's scope would be that virtually *any* smartphone could be classified as an autodialer.[16] If this were so, the TCPA would prohibit *any* call or SMS from being made from *any* smartphone without the prior express consent of the recipient.[17] It seems highly unlikely that the Commission anticipated or intended this result, and the Commission can address this unintended consequence by issuing the requested declaratory ruling.[18]

III. YOUMAIL'S POSITION REGARDING THE DEFINITION OF THE TERM ATDS IS REQUIRED BY THE TCPA'S STATUTORY TEXT AND LEGISLATIVE HISTORY

The statutory text and legislative history of the TCPA demonstrate that the term "ATDS" was intended to have a more limited definition than certain opponents of the YouMail Petition have suggested, based on their overly broad interpretations of prior Commission decisions. The TCPA's plain language makes clear that the statute's autodialer restrictions apply only to equipment that could, *at the time of the call*, be used to store or generate sequential or

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[14] *Id.; accord 2008 Order*.
[15] *2003 Order*, 18 FCC Rcd at 14091-92 ¶ 132.
[16] Numerous applications now exist that permit smartphones to place calls "without human intervention" or to place calls from numbers listed in a directory, such as a contact list.
[17] *See, e.g.,* YouMail Petition at 11. There are various applications that can be downloaded to smartphones to allow the phones to dial numbers "without human intervention" or to sequentially or randomly call numbers set forth in the phones' contact list.
[18] The unintended practical consequence of the Commission's suggestion is even more severe – the Commission has offered fodder for class action lawsuits that do nothing to serve the consumer-oriented goals of the TCPA and instead limit the availability of new and innovative communications technologies to the public, thereby limiting consumers' choices in how to communicate with their peers.

randomized telephone numbers. In relevant part, the TCPA provides that "[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States … to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system … to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."[19] The TCPA defines the term "automatic telephone dialing system" to mean "equipment which has the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator[] and … to dial such numbers."[20]

This language on its face does not support a claim that the ATDS requirement was meant to apply to calls (including text messages) from devices that *could be* configured to "store or produce telephone numbers to be called, using a random or sequential number generator," even when they were *not* so configured at the time that the relevant calls were placed. The statute expressly limits the term "ATDS" to cover only "equipment which *has* the *capacity*" to store or produce such numbers.[21] First, Congress's use of the present-tense word "has" made clear its intent that the device at issue be able to "store or produce" numbers "using a random or sequential number generator" at the time of the alleged violation – *i.e.*, *at the time the call at issue is placed*. Congress could have defined ATDS to include equipment that "has *or could develop* the capacity," but it did not. Second, Congress's use of the term "capacity" confirms Congress's intention that the term ATDS apply only to equipment that can generate or store

[19] 47 U.S.C. § 227(b).
[20] *Id.* § 227(a)(1).
[21] *Id.* (emphases added).

randomized or sequential numbers, not to equipment that later could someday be configured to do so. Congress might well have referenced equipment with the "potential" to store or produce random or sequential numbers for dialing, but – again – it did not. Rather, it included only equipment that has the "capacity" – the present capability – to do so. These congressional choices must be respected. Congress's "choice of words is presumed to be deliberate,"[22] and bodies interpreting statutes must "give effect … to every clause and word" that Congress uses.[23] An interpretation that treats as an ATDS any equipment not currently able to store or produce sequential or randomized numbers would unlawfully contravene the words that Congress chose.

The TCPA's legislative history further demonstrates that Congress was concerned with the actual use of sequential or random-number calling by telemarketers, not with the transmission of calls using devices that could, at some point in the future, be programmed to place such calls. As Senator Fritz Hollings stated when he introduced the legislation: "This bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country – telemarketing calls placed to the home."[24] Thus, the Senate Report on the bill as passed expressed worry that telemarketers might "dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing calls,"[25] and the House Report observed that "[t]elemarketers often program their systems to dial sequential blocks of telephone numbers."[26] Signing the bill into law, President George H.W. Bush expressed concern that, notwithstanding its merits, the TCPA "could also lead to unnecessary regulation or curtailment of legitimate business activities,"

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[22] *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013).
[23] *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (internal quotations and citations omitted).
[24] 137 Cong. Rec. 18123 (1991).
[25] *See* S. Rep. No. 102-178, at 1-2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969.
[26] H.R. Rep. No. 102-317, at 10 (1991).

emphasizing that he had signed it only "because it gives the Federal Communications Commission ample authority to preserve legitimate business practices."[27]

In short, Congress used words that limited the ATDS definition to equipment currently able to generate or store sequential or randomized numbers – not equipment that might some day be configured to do so – and the President signed the law only because it enabled the Commission to limit the TCPA's scope appropriately. Those choices – which reflected underlying concerns regarding the activities of *telemarketers* – must be respected by bodies interpreting that legislation.

IV. SOFTWARE AND APP PROVIDERS THAT ENABLE CONSUMERS TO CHOOSE TO SEND MESSAGES DO NOT "MAKE" CALLS FOR PURPOSES OF THE TCPA

Software and app providers that merely facilitate the sending of communications, including text messages, by their users do not "make" calls.[28] Consequently, even if the equipment used by software and app providers such as YouMail, Glide Talk, and GroupMe were properly characterized as ATDSs (and, for the reasons set forth above, they are not), text messages sent by the providers' users via the apps and software developed by such providers cannot result in the violation of the TCPA by the providers.

Such providers should not be deemed to "make" calls for purposes of the TCPA because the providers do not cause the text messages to occur.[29] The providers do not initiate the text

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[27] George Bush: "Statement on Signing the Telephone Consumer Protection Act of 1991," December 20, 1991, *available at* http://www.presidency.ucsb.edu/ws/?pid=20384.

[28] *See* 47 U.S.C. § 227(b)(1) ("It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—(A) *to make any call* … using any automatic telephone dialing system or an artificial or prerecorded voice….") (emphasis added).
See CallFire Comments, CG Docket No. 02-278, at 4 (filed July 25, 2013) ("CallFire Comments"); *see also* American Financial Services Association Comments, CG Docket No. 02-278, at 4, (filed July 19, 2013).

[29] *See* YouMail Petition at 12.

messages or choose the recipients of the text messages. In addition, in many cases the providers do not control the content of the text messages. Instead, the providers' software and apps merely "operate as intermediate conduits, and should be recognized by the Commission as such."[30] The providers should not be subject to crippling penalties under the TCPA simply because the providers offer innovative new communications services that are widely embraced by the public to facilitate communications with other members of the public.

The Glide App is an excellent example of the fact that the users of communications software and apps, rather than the providers that developed them, "make" calls by sending text messages. Users of the Glide App must have the Glide App installed on their devices to exchange video messages over the Glide App. As a result, to fully realize the benefits of the Glide App, new users must introduce their friends and family members to the Glide App, which they often do by sending text message invitations instructing the message recipients how to download the Glide App. Although the Glide App facilitates this process, it is Glide App users, and not Glide Talk, who decide to send the text message invitations, determine to whom to send the text messages, and choose when to send the text messages. In addition, the users can choose the content of the text messages.[31]

Further, the text message invitations only can be sent by users through the Glide App to recipients with whom the user has a prior relationship, as demonstrated by the fact that the recipient is a Facebook friend of the sender or is in the senders' device's contact list. This pre-existing relationship between the sender of the text message invitation and its recipient

[30] CallFire Comments at 4.

[31] Even if the Glide App did not facilitate the sending of text message invitations by Glide App users, a user nevertheless could still choose to use text messages to introduce his or her friends and family members to the Glide App. The Glide App merely facilitates this process by reducing the administrative burden on users and enabling them to avoid potential fees that may be charged by their carriers for sending text messages.

demonstrates that the recipient expected and intended to receive messages from the sender.[32] Thus, these text message invitations constitute peer-to-peer information communications. They are not the type of commercial telemarketing communications targeted by Congress when it adopted the TCPA, and they are not calls "made" by Glide Talk.

V. CONCLUSION

For the reasons discussed herein, the Commission should grant the YouMail Petition and issue a declaratory ruling clarifying these key aspects of the TCPA.

Respectfully submitted,

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[32] *See* GroupMe Comments, CG Docket No. 02-278, at 7 (filed July 25, 2013) (arguing that the Commission should consider the context of communications in clarifying what constitutes "prior express consent" and noting that "[s]ocial conventions serve as a foundation for determining users' and consumers' expectations which are also essential to TCPA analysis"); Cargo Airline Association Notice of *Ex Parte* Presentation , CG Docket No. 02-278, at 1-2 (filed June 19, 2013) ("[T]he Commission should confirm that the provision of a package recipient's wireless telephone number by a package sender (a friend, relative, merchant, or similar intermediary) constitutes 'prior express consent' for delivery companies to send autodialed and prerecorded, non-telemarketing customer service notifications related to that package.").